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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

WAYNE LANI, Executor of the Estate of)	Appeal from the Circuit Court
Genevieve Lani, Deceased,)	of Lake County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 08-L-657
)	
ADVOCATE HEALTH AND HOSPITALS)	
CORPORATION, d/b/a Advocate Good)	
Shepherd Hospital,)	Honorable
)	Christopher C. Starck,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted summary judgment where plaintiff was unable to demonstrate the existence of the element of proximate cause in his negligence action. The trial court also properly denied plaintiff leave to amend his complaint on the eve of trial and after the grant of summary judgment where such an amendment would surprise and prejudice defendant and ample previous opportunities to amend existed.

¶ 2 Plaintiff, Wayne Lani, Executor of the Estate of Genevieve Lani, deceased, appeals the judgment of the circuit court of Lake County granting summary judgment in favor of defendant, Advocate Health and Hospitals Corporation, d/b/a Advocate Good Shepherd Hospital based on the

issue of proximate causation and the trial court's determination that the opinion of plaintiff's nursing expert was speculative. On appeal, defendant contends that factual issues should have precluded the grant of summary judgment and the trial court erred in denying plaintiff's oral (and subsequently written) motion to amend his complaint. We affirm.

¶ 3 Genevieve Lani (decedent) entered Advocate Hospital's (Advocate) emergency department on April 8, 2003. Plaintiff, who is decedent's son and the executor of decedent's estate, and his wife brought decedent to the hospital as a result of worsening dementia. Decedent suffered from dementia since 1996. Upon admittance, hospital staff noted that decedent was alert, coherent, calm, and cooperative. However, plaintiff and his wife assert that decedent showed signs of agitation. At 4:45 a.m., nine hours after admittance, Nurse Wilkins transferred decedent from the emergency floor to the general medical floor.

¶ 4 Nurse Ashwood admitted decedent to the general medical floor and acted as decedent's primary nurse. Ashwood assessed decedent and entered her results into a computer that generated a fall score. Decedent was graded as a high risk for falling because of her history of falls, unsteady gait, and mental status, among other considerations. Ashwood situated decedent in her room and took the following precautions: raised bedrails, left the light on, placed a call light within decedent's reach, and planned to check on decedent every two hours.

¶ 5 Prior to 6:00 a.m., Ashwood found decedent on the floor beside her bed. Ashwood returned decedent to her bed and contacted Dr. Ostrowski. Ostrowski ordered restraints and x-rays of decedent's hip. Ostrowski did not ask to be notified of the x-ray results. Ashwood signed Ostrowski's orders and restrained decedent. Ashwood then reported this information to the oncoming nurse and concluded her shift.

¶ 6 On April 14, 2003, five days after decedent's fall, Dr. Cummins performed surgery on decedent's fractured hip. In the five-day interim, decedent received physical therapy and sat in a cardiac chair. Plaintiff alleged that the delay, the hospital care, and the therapy would have caused decedent pain.

¶ 7 Following surgery, decedent's fracture stabilized and began healing; soon, Advocate discharged decedent to an extended care facility. In May 2003, decedent reentered Advocate as a result of a host of other illnesses. By July 17, 2003, decedent's hip fracture completely healed. In the next several years, decedent frequently reentered Advocate with numerous health issues until her death on March 22, 2006.

¶ 8 On October 5, 2006, plaintiff filed a medical malpractice action against Advocate based on the care decedent received from Advocate's nursing staff from April 8, 2003, to April 14, 2003. In 2007, plaintiff amended his complaint twice. Plaintiff's second amended complaint alleged that Advocate's nursing staff acted negligently by breaching the standard-of-care for fall prevention procedures thus leading to decedent's fall and broken hip.

¶ 9 Plaintiff disclosed experts pursuant to Illinois Supreme Court Rule 213(f)(3) (eff. Sept. 1, 2008). Carolyn McLane (McLane), a registered nurse, would act as plaintiff's standard-of-care expert and proximate-cause expert. Dr. Michael Thomas also would act as a causation expert, and Dr. Craig Cummins, plaintiff's treating physician, would act as a medical expert. McLane's opinion stated that Advocate's nursing staff's actions fell below the standard-of-care in failing to communicate medical information from the emergency floor to the general floor nurse, and, while on the general floor, failing to check on decedent every 15 minutes, failing to activate available bed

alarms, failing to leave lights on, and failing to advise the physicians of decedent's hip fracture for over four days.

¶ 10 The court set trial for April 4, 2011, with a deadline for discovery and motions for summary judgment to be filed by March 7, 2011. On February 28, 2011, Advocate filed a motion for summary judgment, arguing that the opinion of McLane, plaintiff's standard-of-care and proximate causation expert, did not demonstrate the existence of proximate cause. In response, plaintiff argued that questions of fact remained concerning the nursing staff's transmittal of information upon moving decedent between floors and that McLane's opinion that decedent should have been checked on every 15 minutes caused decedent's fall and broken hip. For the first time, plaintiff also argued Advocate's nurses deviated from the standard-of-care by failing to immediately advise the doctors concerning decedent's x-ray results.

¶ 11 On March 23, 2011, the court held a hearing on Advocate's motion for summary judgment. At the hearing, plaintiff presented his argument that the nursing staff deviated from the standard-of-care after decedent's fall. This argument, asserting failures by the entire nursing staff after decedent's fall, rather than just Nurse Ashwood or Nurse Wilkins, had not previously been presented. When questioned by the court, plaintiff acknowledged that none of his previous complaints alleged deviations from the standard-of-care by the entire nursing staff after the decedent's fall. The trial judge then rejected plaintiff's oral amendment to his complaint because of the closeness of trial and the alteration of plaintiff's expert's opinion to matters occurring after decedent's fall.

¶ 12 The trial court awarded summary judgment in favor of defendant and against plaintiff. Plaintiff later filed a motion to reconsider and a motion for leave to amend his second amended

complaint. The trial court denied both motions, stating that plaintiff's expert sought only to present speculative testimony and that creating a new allegation eleven days before trial would prejudice the defendant. Plaintiff timely appeals.

¶ 13 On appeal, plaintiff argues that factual issues he raised should have precluded the grant of summary judgment. In addition, plaintiff argues that the trial court erred in denying his motion to amend the complaint to add another claim of negligence regarding the nurses' failure to communicate the x-ray results to the doctor for over four days. We address each contention in turn.

¶ 14 Turning to the summary judgment issue, we first consider our standard of review. An appellate court applies a *de novo* standard of review for a trial court's summary judgment rulings. *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 135 (1997). A motion for summary judgment should only be granted when there is no material issue of fact. *Id.* If a plaintiff fails to establish an element of its case, summary judgment is proper. *Id.* An order of summary judgment should be reversed only if a genuine issue of material fact existed or if the judgment was incorrect as a matter of law. *Id.* A court must construe the pleading, depositions, admissions, and affidavits against the movant. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162 (2007).

¶ 15 Plaintiff first asserts that a question of fact exists regarding the adequate transfer of decedent's health information between the emergency and the general floors. However, plaintiff cites no expert testimony, deposition statements, or case law to support his argument. Plaintiff only asks this court to "see Statement of Facts above." Plaintiff's assertion that there is a genuine issue of material fact on this issue does not create one. Furthermore, in its reply brief, plaintiff retracts his argument concerning the alleged negligent transfer of decedent's health history between the

emergency floor nurse and the general floor nurse. Plaintiff's concession limits his argument to issues relating to Nurse Ashwood's failure to check on decedent every 15 minutes and the trial court's rejection of plaintiff's amended complaint. It is well settled that Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) requires a party to include within the argument section of its brief citation to authorities and pages of the record relied upon. Points not argued by the party are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Accordingly, pursuant to Rule 341 and plaintiff's concession, we shall not consider this argument.

¶ 16 Next, we consider whether there is sufficient evidence in the record to demonstrate the existence of plaintiff's negligence claim. A negligence cause of action must include all of the elements of negligence: duty, breach of duty, causation, and damages. *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶15. The breach of duty must be the proximate cause of the injury. *First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 256 (1999). Proximate cause is "a cause that, in the natural or ordinary course of events, produced the plaintiff's injury." *Richter v. Village of Oak Brook*, 2011 IL App (2d) 100114, ¶21 (quoting Illinois Pattern Jury Instructions, Civil, No. 15.01 (2011)).

¶ 17 Plaintiff's experts never established the element of proximate causation necessary to show a viable negligence cause of action. If an expert's opinion is not based upon fact, the expert's conclusions do not create a question of fact. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2000). "A medical expert witness may not base his opinion on guess, conjecture, or speculation." *Id.* Plaintiff must show with reasonable certainty that defendant's acts proximately caused the injury. *Whitman v. Lopatkiewicz*, 152 Ill. App. 3d 332, 338 (1987).

¶ 18 This case's analog is *McCormick v. Maplehurst Winter Sports, Ltd.*, 166 Ill. App. 3d 93 (1988). In that case, the plaintiff sustained injuries after releasing a towrope and coasting downhill on a snow tube. *Id.* at 95. Neither the plaintiff nor any witness could recall what happened to cause the plaintiff's injuries. *Id.* However, the plaintiff's expert opined that it was possible plaintiff sustained injuries from other boys on the towrope line as a result of a negligently supervised towrope. *Id.* at 96-97. This court determined that the expert's testimony raised no material question of fact as to the cause of the plaintiff's injuries because the expert's testimony rested upon speculation. *Id.* at 100. This court considered that the expert reached his conclusions by drawing upon facts from circumstances other than those at issue and relying upon the plaintiff's attorney's information as a source of knowledge. *Id.* at 99-100.

¶ 19 Like the expert in *McCormick*, plaintiff's expert witness here relies not on fact, but on pure speculation. Plaintiff relies upon McLane's opinion that, had Advocate's nursing staff checked in on decedent every 15 minutes, as opposed to the planned two-hour intervals, decedent's fall would not have occurred. Also, plaintiff relies upon Dr. Cummins, decedent's treating physician. Dr. Cummins' testimony provided his opinion that, if decedent fell from her bed, she would have broken her hip. Both McLane's and Cummins' statements fail to provide any factual basis as to the proximate cause of decedent's fall because both statements rely on speculation, not on underlying facts presented by plaintiff.

¶ 20 First, McLane stated that the standard-of-care required Nurse Ashwood to check in on decedent every 15 minutes and that the failure to check on decedent caused the fall. When pressed to explain how more frequent checks would have prevented decedent's fall, McLane could offer no explanation. McLane's deposition testimony reveals that her opinion was grounded on two

assumptions: decedent's behavior changed from calm to agitated leading decedent to get out of bed and that a visit every 15 minutes would identify behavioral changes. No factual foundation existed to show that decedent's behavior changed causing her to get out of bed or that frequent visits every 15 minutes would detect a behavior change. Even granting McLane's assumption, decedent could have fallen in between the 15-minute visits. Rather, McLane's opinion, like the expert's opinion in *McCormick*, relied only upon speculation. Furthermore, McLane later conceded that decedent's fall still could have occurred, even if decedent was visited every 15 minutes. As such, the facts only show that decedent was found on the ground. McLane's opinion fails to present any facts that show *how* decedent ended up on the ground, and the opinion fails to present any omission by the nursing staff that led to decedent's fall.

¶ 21 Even more similar to *McCormick*, plaintiff asserts that Dr. Cummins' opinion creates a factual issue as to decedent's fall. Plaintiff argues that Dr. Cummins makes a reasonable assumption that decedent did indeed fall out of bed. Plaintiff, however, fails to point out that Dr. Cummins only makes this assumption when plaintiff's attorney forces him to assume that decedent fell out of bed for the purpose of determining what fractured decedent's hip. Thus, plaintiff's attorney conflates the assumptions found within his hypothetical to be part of Dr. Cummins' testimony on causation. In fact, Dr. Cummins' purported claim that decedent fell out of bed is directly contradicted by Dr. Cummins' deposition statement that he had no information as to how the fall occurred. When Dr. Cummins' testimony is distilled, it reveals that his testimony only states that a fall caused the fracture in decedent's hip. Again, Dr. Cummins presents no information as to the actual cause of the fall. As *McCormick* noted, these assumptions by the expert or the attorney presenting the expert, do not create an issue of fact, but rather provide speculation. *McCormick*, 166 Ill. App. 3d at 100.

¶ 22 Similarly, plaintiff argues that defendant's expert, Dr. Boone Bracken, assumes that decedent fell out of her bed in defendant's Rule 213 answers. The record does not support that Bracken made that assumption. Bracken states in defendant's Rule 213 answers that "there was no reason to think that the patient was going to fall out of bed." This opinion was made in reference to the information provided to Nurse Ashwood on the general floor and entered in the computer to generate a risk-of-fall score. This statement does not assume decedent fell out of bed, but states that the nurse should not have expected a fall given the information. Nothing in defendant's Rule 213 answers shed light on how decedent actually ended up on the floor.

¶ 23 In sum, McLane, Cummins, and Bracken failed to present any factual evidence as to what proximately caused decedent to fall and injure her hip. Without this evidence, plaintiff cannot identify a genuine issue of material fact that would make summary judgment inappropriate.

¶ 24 In addition to failing to identify evidence demonstrating a factual issue, plaintiff is also unable to use the circumstantial evidence in the record to demonstrate the existence of a factual issue. Circumstantial evidence must show a probability of the existence of the fact, and circumstantial facts must be of such a nature and so related as to make the conclusion more probable. *Laird v. Baxter Health Care Corp.*, 272 Ill. App. 3d 280, 290 (1994). But, if a party relies on circumstantial evidence to create a fact, the conclusion drawn must be the only probable conclusion. *Williams v. Chicago Board of Education*, 267 Ill. App. 3d 446, 452 (1994). Plaintiff must show with reasonable certainty that defendant's acts proximately caused the injury. *Whitman*, 152 Ill. App. 3d at 338.

¶ 25 In this case, plaintiff only can show that Nurse Ashwood found decedent on the floor next to her bed. The mechanism of the fall, whether it be from the bed or while walking after getting out

of the bed or any other scenario, does not constitute a material fact. Plaintiff has alleged that it was the failure to observe that caused the injury; the mechanism of injury, even if disputed, cannot be deemed a material fact sufficient to preclude summary judgment.

¶ 26 Furthermore, the fact that Nurse Ashwood found decedent next to her bed does not show that defendant's acts caused this fall. Nurse Ashwood's act, or inaction, was failing to check on decedent every fifteen minutes. It cannot be argued that even a 15-minute interval would have been responsible for decedent's fall, because decedent still could have fallen regardless of the frequency of Ashwood's visits.

¶ 27 We therefore conclude that plaintiff fails to present any facts relating to the proximate cause of decedent's injury. This failure results in the conclusion that a necessary element of plaintiff's negligence action is missing, and this defeats plaintiff's claim as a matter of law. *Midwest Trust Services, Inc. v. Catholic Health Partner Services*, 392 Ill. App. 3d 204, 210-11 (2009) (summary judgment proper where the plaintiff fails to demonstrate a genuine factual issue regarding proximate causation). Accordingly, the trial court properly granted summary judgment in favor of defendant.

¶ 28 Plaintiff next argues that the trial court erroneously denied his attempt to amend the complaint to add a claim for negligence arising out of the failure to communicate the results of the x-rays for over four days. We disagree.

¶ 29 Generally, trial courts should liberally allow amendments to pleadings; however, a court may exercise its discretion in denying an amendment to a pleading. *Lee v. Chicago Transit Authority*, 152 Ill. 2d. 432, 467 (1992). The court's decision to deny an amendment is reviewed for an abuse of discretion. *Id.* In deciding whether to allow an amendment, a court should consider whether the amendment would prejudice or surprise the opponent, cure a defect, create issues of timeliness, and

whether the complaint could have been amended previously. *Id.* At 467-68. An amendment should not be admitted if the movant had full knowledge at the time of the original pleading and presented no excuse to explain his or her pleading's inadequacies. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 48 (1992).

¶ 30 In *Lewis v. American Airlines, Inc.*, 287 Ill. App. 3d 957 (1997), the trial court remained within its discretion in denying an amendment to the complaint. In that case, the plaintiff attempted to amend his complaint for a fourth time, six years after the initial complaint. *Id.* at 963. Moreover, trial was but a month away and the case had moved beyond the pleading and discovery stages. *Id.* The plaintiff finally submitted his motion after summary judgment had been granted. *Id.*

¶ 31 Unlike *Lewis*, this court has allowed amended pleadings even after summary judgment. In *Evans v. United Bank of Illinois, N.A.*, 226 Ill. App. 3d 526 (1992), this court allowed the plaintiff to amend a complaint in which the amendment would cure the defective pleadings and the record showed that the amended complaint would not cause prejudice. Also, the amendment was timely as it was within the pleading stage, was the plaintiff's first amendment, was within two years of the filing of the original complaint, and was made upon the plaintiff's first opportunity to amend its complaint. *Id.* at 534-535.

¶ 32 In this case, plaintiff sought to orally amend his complaint nearly four years after he was allowed to submit his second amended complaint and nearly eight years after the filing of the original complaint. At that time, the deadline for discovery and dispositive motions had long passed, and trial was set to begin in eleven days, even less time than in *Lewis*. Also, like *Lewis*, plaintiff here did not file a written motion to amend his complaint until after summary judgment. In fact, he filed his motion to amend the complaint at the same time he filed a motion for the court to reconsider its

summary judgment ruling. Thus, we find no abuse of discretion in the trial court's decision to refuse leave to amend.

¶ 33 *Evans* does not change our view, because this case is distinguishable. Here, plaintiff's amendment came just eleven days before trial and after the discovery and motions deadline had passed, while in *Evans*, the request to amend came during the pleading stages. *Evans*, 226 Ill. App. 3d at 534-35. Also, unlike *Evans*, plaintiff has had ample opportunities to amend his complaint and had done so twice in the past; in *Evans*, the amendment came at the plaintiff's first opportunity to do so. *Id.* Finally, plaintiff's final requested amendment would come nearly five years after his original complaint, more than double the time in *Evans*.

¶ 34 More importantly, in this case, plaintiff's amendment, if allowed, would cause prejudice and surprise to defendant, unlike the amendment in *Evans*. First, Advocate had not been put on notice that it had to defend itself against negligence allegations against the nursing care provided after decedent's fall. Decedent never had the opportunity to even determine which nurse's conduct it would be defending. Furthermore, no discovery was done to determine who had the responsibility to handle decedent's x-rays, and defendant should not have been prepared to do such discovery because the pleadings only asserted that negligence occurred before decedent's fall.

¶ 35 We also note that plaintiff did not use the proper form to amend his complaint. Illinois Supreme Court Rule 131 (eff. Nov. 15, 1992), requires that all papers be legibly written or typed. Plaintiff initially orally moved to amend his complaint at the hearing for summary judgment. At hearing, plaintiff could offer no legitimate excuse for his failure to offer an earlier amendment. In response to the trial court's query as to why this amendment had not been raised earlier, plaintiff responded, "I simply failed." Further, plaintiff did not reduce his motion to proper form until after

the trial court's grant of summary judgment for defendant. Submission of this motion in proper form after summary judgment had been granted only further exacerbated the timeliness issues.

¶ 36 Accordingly, and in light both *Evans* and *Lewis*, we conclude that the trial court's decision to deny the amendment remained within its discretion because the motion to amend lacked timeliness, prejudiced defendant, and was the result of plaintiff's own failures after ample opportunity to amend the pleadings.

¶ 37 As a final point, we need not consider plaintiff's contention that the pleadings in his final attempted amended complaint should survive summary judgment. Plaintiff argues that the issue presented in his oral and written amended complaints should survive summary judgment because the conduct of the nursing staff rose to the level of gross negligence. This level of negligence, plaintiff argues, obviates the need for expert opinion, so that a material question of fact exists to preclude summary judgment and send this action to trial. Plaintiff puts the cart before the horse. As the trial court acted within its discretion in denying leave to file plaintiff's final attempted amended complaint, it is not properly before us, and neither are the contentions regarding and factual issues raised by the nursing staff's care of decedent after her fall.

¶ 38 Accordingly, for the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 39 Affirmed.